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No. 92-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND CO., GEORGE KING, AND GROVER C. GOODE,
Respondents.

On Petition for Writ Of Certiorari To The Supreme Court Of Appeals of West Virginia

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BRIEF OF AMICUS CURIAE UNIVERSITY SCHOLARS AND LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The amici are legal scholars who have researched or published on the subject of punitive damages, professors of law who are expert in the fields of torts, products liability, or constitutional law, and other university scholars who have read and written on the interplay of law and such diverse disciplines as economics and sociology.

NICHOLAS ASHFORD is Professor of Technology and Policy at the Massachusetts Institute of Technology where he teaches courses in regulatory law and policy, and technology and law. He holds a Ph.D in Chemistry and a law degree from the University of Chicago, where he received graduate training in economics. He is the author of Crisis in the Workplace: Occupational Disease and Injury, and co-author of Monitoring the Worker for Exposure and Disease, Chemical Exposures: Low Levels and High Stakes, and Law and the Working Environment; **TANIA LOVELL BANKS** teaches at the University of Maryland Law School. She holds a B.A. from Syracuse University and a J.D. from Howard University. She teaches in the fields of civil rights, torts, and criminal law. She has served as a consultant to the North Central Association of Colleges and Schools. She was a member of the American Association of Law Schools Committee on Curriculum and Research; **JAMES D. A. BOYLE** is Professor of Law at American University's Washington College of Law. He was a visiting Professor of Law at Harvard University Law School. His fields of expertise include the Legal Profession, Jurisprudence and Torts. He is former President of the American Association of Law Schools Jurisprudence Section; **LEONARD BUCKLE** is Co-Chair of the Law, Policy and Society doctoral program at Northeastern University. he has served frequently as an expert witness on the social science aspects of legal issues. He is President of the American Legal Studies Association; **SUZANNE THOMAS BUCKLE** is Co-Chair of the Law, Policy and Society doctoral program at Northeastern University. She specializes in the alternative resolution of civil disputes. She has frequently been an expert witness on social science issues. She is chair of the

board of the American Legal Studies Association; **DR. STEPHEN FIELDING** is an Assistant Professor of Sociology at State University of New York at Genseo, where he teaches social research methodology. He is a former researcher at Harvard Medical School. His dissertation was on the subject of medical malpractice claims; **DR. ROBERT GRANFIELD** is Assistant Professor of Sociology at the University of Denver. He is the author of Making Elite Lawyers. He teaches research methods and statistics at the University of Denver and has research and written on the subject of punitive damages; **DR. THOMAS KOENIG** is Associate Professor of Sociology at Northeastern University where he is a core faculty member of the Law, Policy & Society doctoral program. Professor Koenig received his Ph.D from the University of California in Santa Barbara. He is expert in statistical analysis of large data bases. Professor Koenig has researched and written widely on the subject of punitive damages. He has testified before Congress on empirical research on punitive damages; **DR. YALE MAGRASS** is Professor of Sociology at University of Massachusetts at Dartmouth. He is author of Thus Spake the Moguls and co-author of Power in the Highest Degree; **BERNARD MICHAEL ORTWEIN** is Professor of Law at Suffolk University. He has also served as a Legal Consultant for the Massachusetts Department of Community Affairs; **JOSEPH A. PAGE** is Professor of Law at Georgetown University. He is author of The Law of Premises Liability (1973); and Bitter Wages: The Nader Report on Disease and Injury on the Job (2d ed. 1988); **MARC PERLIN** is Professor of Law at Suffolk University Law School. He holds a B.A. from Boston University and a J.D. from Northeastern University of Law. He is the author of numerous books and articles on civil procedure and family law; **JERRY J. PHILLIPS** is W. P. Toms Professor at the University of Tennessee. He is author of Cases and Materials on Torts and Related Law (with Noel) (1980); and Products Liability Cases and Materials (with Noel) (2d ed. 1982). He also serves as an advisor to the Federal Interagency Task Force on Products Liability; **DONALD L. POLK** is Associate Professor of Social Work at Suffolk University. He has also served as President and CEO of both the Urban League of Eastern

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As both scholars and citizens, we have a keen interest in ensuring that decisions by this Court are rendered on the basis of the best information available. We likewise have an obligation to present to the Court whatever wisdom and understanding we have gained over the years in researching subjects that have bearing on the issues in this case.

None of the amici have an interest in either the outcome of this case or the outcome of any punitive damages case. Amici seek to advise the Court about the results of their research in the hope that it will correct some popular misconceptions about the functioning of the punitive damages remedy.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Petitioner and its amici assert diverse and unsubstantiated claims that awards of punitive damages are too numerous, too large, and growing fast in both number and size. They maintain that a rising tide of punitive damage awards not only threatens their individual corporate interests but also jeopardizes our country's overall economic health and its competitive standing in world markets.

The Petitioner and its amici specifically assert that "[p]unitive damage awards, particularly in the business context, are

increasing by leaps and bounds," Brief of the Equal Employment Advisory Council ("EEAC Brief"), at 13; that punitive damages awards are increasing "exponentially," Brief of Arthur Anderson & Co., et al ("Big Six Brief"), at 2; that these awards are not only "massive" but "discriminatory," Brief of the Products Liability Advisory Council ("PLAC Brief"), at 1-2; that the calamity of punitive damages "running wild" has not abated since this Court's decision in Pacific Mutual Insurance Co. v. Haslip, 111 S.Ct. 1032 (1991), Brief by the American Tort Reform Association ("ATRA Brief"), at 4-5; that increasingly numerous and increasingly large awards of punitive damages "have deterred socially beneficial behavior and led to grotesque misallocation of resources," ATRA Brief at 6 (citations omitted); that jurors are prejudiced against corporate defendants, PLAC Brief at 2, 15[1];

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[1] It is odd that jurors are still tarred with the brush of being biased towards plaintiffs in view of the fact that every available empirical survey reveals that jurors are far more pro-defendant than they are pro-plaintiff. Nowadays, "[r]ather than revealing jurors willing and eager to impose on business the costs of plaintiffs' injuries, our findings show that jurors were suspicious of the legitimacy of plaintiffs' claims and concerned about the personal and social costs of large jury awards. [Moreover,] [d]espite insistence on product safety and high expectations of business, jurors were [a] generally favorable toward business, [b] skeptical more about the profit motives of individual plaintiffs than of business defendants, [c] committed to holding down awards." Valerie P. Hans and William F. Lofquist, Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate, (University of Delaware, May, 1992), at 11; (to be published in a forthcoming issue of Law and Society Review). Generally, "tort jurors had strong negative views about the frequency and legitimacy of civil lawsuits." Id. Specifically: "83% of the tort jurors sampled either agreed or strongly agreed with the statement that '[t]here are far too many frivolous lawsuits,'" id. at 41, Table 1; "81% agreed or strongly agreed with the proposition that '[p]eople are too quick to sue . . . ,'" id.; "39% agreed or strongly agreed with the assertion that '[t]he money awards that juries are awarding in civil cases are too large,'" id.; "32% agreed or strongly agreed that "[t]he number or lawsuits show that our society is breaking down.'" Id. On the other hand, "[c]ontrary to the skepticism shown plaintiffs, corporate defendants were typically not subjected to such vigorous scrutiny," id., Profs. Hans and Lofquist "found little evidence of tough standards and punitiveness [by jurors] toward[s] . . . corporation[s] . . . ," id., at 18; learned that most jurors evinced

only "scattered concern about the profit motive causing business to cut corners," id. at 23; discovered that most jurors polled thought that an "organization's assets should not be and were not relevant to the liability and award decisions," id. at 26; and found that jurors' "comments derogating business were rare compared to the more frequent negative evaluations of the plaintiffs and their [putatively] mercenary motives." Id. at 24. The numbers bear out their conclusions: 57% of the tort jurors sampled either agreed or strongly agreed with the statement that "[t]he threat of lawsuits is so prevalent today that it interferes with the development of new and useful products; 51% agreed or strongly agreed with the view that "[b]ig business . . . is adequately concerned with the safety of its workers"; and 32% agreed or strongly agreed with the notion that "[t]he courts have meddled so much in the workplace that many businesses are not able to remain competitive."
Id. 42- 43 – Table 2: Tort Jurors' Attitudes Toward Business Regulation and Litigation.

The survey results published by Profs. Hans and Lofquist are consistent with those reported earlier this year by the Roper Organization, Inc. According to the Roper poll:

> [**Seventy percent** of the persons surveyed agreed that:] a major effects of liability suits is to give lawyers "much more money than they deserve." **Sixty-three percent** agreed that "people often start frivolous lawsuits because awards are so big and they have so little to lose." . . . Only [**40%** of the] people queried . . . said a significant result of liability suits is the fair compensation of victims. . . . Almost [70% of those surveyed] would limit punitive awards, and a majority wanted to cap awards for lost wages and pain and suffering.

Quayle's View on Liability Suits Is Widely Held, Poll Shows, Wall St. Jnl., Feb. 19, 1992, at B10. (Emphasis added). See also Kevin M. Clermont, and Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Corn. L. Rev. 1124 (1992) (revealing that judges are more pro-plaintiff than jurors; in personal injury cases, plaintiffs won 50% of all bench trials, while winning in only 29% of the cases tried to a jury); Sean F. Mooney, Crisis and Recovery: A Review of Business Liability Insurance in the 1980s, Insurance Information Institute, May 1992, at 19 ("A 1992 survey shows that 44 percent of public believes only about half of the plaintiffs in [civil liability] suits have just cause to file suit."); Edith Greene, Jane Goodman, and Elizabeth F. Loftus, Jurors' Attitudes About Civil Litigation and the Size of Damage Awards, 40 Am. U. L. Rev. 805, 805 (1991) (90% of jurors polled "agreed that there are too many

that judges are either unwilling or unable, to "stem . . . the massive increase in punitive damages verdicts," id., at 1-2; and state legislatures have likewise been incapable of providing a "uniformly effective answer to the problem of excessive punishments." ATRA Brief at 29.

The Petitioner and its amici fail to substantiate these claims by systematic, empirical examination of the patterns of punitive damage awards. Moreover, they fail to provide this Court with an objective review of the five separate detailed, consistent, and uncontroverted empirical studies that have been published in the last six years by federal government researchers, independent foundations and think tanks, and university scholars. Finally, they rely, mistakenly, on an ostensibly objective study written by lawyers for a company that was assessed the largest punitive damages award in history.

The largely rhetorical arguments of the Petitioner and its amici should not tempt the Court into trenching upon the historically sovereign provinces of the states. As our review will show, there is simply no compelling reason for the Court to turn back the clock to the Lochner v. New York, 198 U.S. 45 (1905), era by abandoning the modest "rational relationship" that the Court has used for decades in evaluating whether a state law violates the Fourteenth Amendment's due process clause.

lawsuits." Id. at 814); Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest? 18 St. Mary's L.J. 797, 824-25 (1987).

ARGUMENT

I. THE COURT'S DECISION IN THIS CASE SHOULD BE GUIDED BY EMPIRICAL RESEARCH, NOT UNSUBSTANTIATED CLAIMS

The Petitioner and its amici demand that this Court radically restructure the remedy of punitive damages, a remedy whose use predates the Founding of the Republic and a remedy that has long been honored as a traditional province of the substantive tort law of the states. This demand is premised on unproven claims that punitive damages have not only been "running wild" but are now so untethered to reason that they are beyond the effective power of state courts and state legislatures to bring them under control, to reign in excessive awards, and to provide jurors with meaningful guidance or sufficient constraints.

Before this Court limits the states' long-standing freedom to tailor their substantive, procedural, and evidentiary standards regarding punitive damages to their own assessments of what is necessary and proper to achieve legitimate state goals, we respectfully submit the Petitioner and its amici have the burden of producing empirical evidence sufficient to prove widespread misuse of the remedy of punitive damages. We further submit that the Petitioner and its amici have failed to meet their burden. Moreover, insofar as the claims made by the Petitioner and its amici are not only lacking in factual and empirical support but actually run counter to the consonant and uncontroverted studies regarding punitive damages that have been undertaken in recent years by university, government, and independent researchers, the Petitioner and its amici cannot satisfy their burden.

As discussed below, in contrast to both popular conception and the sundry and unsubstantiated claims of the Petitioner and its amici, each one of the five empirical studies concerning punitive damages that have been published in the last six years convincingly establishes that punitive damages are rarely awarded and, because

of judicial and non-judicial controls present at every stage of the litigation process, are even more rarely collected.

Without solidly grounded empirical data -- well-established research findings, not merely popular myths -- about the frequency, size, and severity of punitive damages, this Court may be misled into believing that radical surgery is required.[2] We submit that any decision not solidly grounded on a foundation of objective, empirical data -- hard truths, not cardboard myths -- about punitive damages is liable to lead to mischief. For example, without information on typical sizes of punitive damage awards, it is impossible for this or any other court to determine whether a given award is "excessive" or "disproportionate." Thus, as American Bar Foundation researchers Stephen Daniels and Joanne Martin have emphasized:

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[2] Of course, just as the debate over punitive damages is not new, neither is the recognition that empirical research is critically important in guiding that debate. Thus, more than 60 years ago, Harvard Law Professor Clarence Morris urged courts, legislators, and scholars to devote at least as much attention to laboriously mined and demonstrable facts as to carefully reasoned theories and artfully crafted proposals. See Clarence Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev., 1173, 1179 (1931). As the authors of one of the empirical studies discussed below lament, however, Morris' exhortation has been honored more in the breach than in the observance. Stephen Daniels and Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 4 (1990). Thus, Daniels and Martin note that modern-day proposals for punitive damages reform are premised on four supposedly factual propositions – "punitive damages are routinely awarded; they are awarded in large amounts; the frequency and size of those awards have been rapidly increased; and these phenomena are national in scope," id. (footnote omitted) – that "are based on scanty empirical data and highly questionable interpretations of those data." Id. (footnote omitted; emphasis added). Indeed, Daniels and Martin observe that proponents of punitive damages reform rely as much upon "horror stories and anecdotes about jury verdicts involving punitive damages" as they do upon "aggregate data on the frequency and size of such awards. Id. at 14. See also id. 15-27 concerning the "punitive damages reformers'" use of public relations techniques and scare tactics to "market" proposals for punitive damages reforms and the reformers' tendentious use of previously-published empirical data.

> Our understanding of the civil justice system, and eventually our ability to devise theoretical statements to explain its behavior, is dependent on the development of a body of sound descriptive studies. Without such building blocks, our understanding of civil justice will not progress beyond the unsubstantiated generalizations that dominate the policy debate.[3]

Fortunately, however, during the last six years, five empirically-based studies of punitive damages awards been published, studies that differ from each other in many respects -- in their authors, in the length of the periods studied, and in the geographical areas surveyed -- in fact, in almost every respect but one: their results. On the issues that are critical to this Court's proper disposition of this case, i.e. whether punitive damages are rapidly increasing in number and size and whether they are "disproportionate" in size to awards of compensatory damages, all five studies reach remarkably consistent conclusions, to wit, in the words of Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit and University of Chicago Law Professor William M. Landes, punitive damages present "relatively insignifican[t]" problems. William M. Landes and Richard A. Posner, The Economic Structure of Tort Law (1987), at 304.

As discussed in detail below, each empirical study has reported that, contrary to widespread myths, punitive damages are not numerous, are not rising "explosively," are not "way out proportion" to the awards of compensatory damages, and are not "wild[ly]" increasing in the size of the awards. Finally, although each of the five studies are consistent with each other, at least regarding their ultimate findings that awards of punitive damages are not numerous, are not grossly disproportionate to the

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[3] Stephen Daniels and Joanne Martin, "Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards," American Bar Foundation Working Paper No. 8705 (1988), at 1 (emphasis added).

compensatory damages awarded in the same case, and are not increasing rapidly in either number or size, these studies and these findings are in contradiction with an empirical study prepared by inside and outside counsel for Texaco. For the reasons discussed below, Texaco's exposition of its data and the methodology employed by Texaco in analyzing its data are uninformative and somewhat illusive.

II. THE UNANIMOUS FINDINGS OF EACH OF THE FIVE EMPIRICAL STUDIES OF PUNITIVE DAMAGES UNDERTAKEN IN THE LAST SIX YEARS ESTABLISHES THAT PUNITIVE DAMAGES ARE NOT A REMEDY IN NEED OF REFORM, LET ALONE THE RADICAL REFORM PROPOSED BY THE PETITIONER AND ITS AMICI

A recent review of the research on punitive damages concludes that, "every empirical study of the [punitive damages] question has reached conclusions that, to say the least, fail to support," the claim that "punitive damages have grown dramatically in both frequency and size." Michael Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System--and Why Not?, 140 U. Pa. L. Rev. 1147, 1254 (1992). The five comprehensive studies of the size and frequency of punitive damages referenced by Professor Saks are discussed in chronological order below.

1) LANDES AND POSNER STUDY (1987) -- As the Court well knows, punitive damages have been the subject of controversy for at least a decade. "Because so much concern ha[d] been expressed about runaway juries imposing colossal punitive damage awards in products liability cases," Judge Richard

M. Posner and University of Chicago Law Professor William M. Landes "attempted to estimate the quantitative importance of such awards by examining all reported products liability cases in the federal courts of appeals from the beginning of 1982 through November 1984."[4] William M. Landes and Richard A. Posner, The Economic Structure of Tort Law (1987), at 302.

Their research led them to conclude that punitive damages were "relatively insignifican[t] . . . ." Id., at 304.

> Of the 172 cases in the sample, punitive damages were upheld on appeal in only four instances, which is fewer than 3 percent of the cases and fewer than 5 percent of the cases that plaintiffs won. [The data revealed] also that punitive damages are more likely to be reversed than are other outcomes. For example, six of ten punitive damage awards were reversed and one more was reduced by two-thirds. In comparison, fewer than one-third of the decisions in favor of plaintiffs but not awarding punitive damages were reversed.

Id. (emphasis added).

Judge Posner and Professor Landes subsequently enlarged their sample, but the addition of more data further validated rather than undercut their initial findings. Accordingly, they concluded that:

> [t]he insignificance of punitive damages in our samples is evidence that they are **not being routinely awarded**. Out of a total of 359 cases in all of our samples, punitive damages were allowed in only seven -- 2 percent.

Id., at 305-06 (emphasis added). Finally, Judge Posner and Professor Landes observed that [t]he average award of punitive damages in those seven cases was less than $500,000, slightly more than the average actual damages awarded in those cases." Id., at 306 (emphasis added).

2) THE RAND CORPORATION – INSTITUTE FOR CIVIL JUSTICE ("RAND-ICJ") STUDY (1987) – Like Judge Posner and Professor Posner, the RAND Corporation's Institute for Civil Justice observed that "[t]he award of punitive damages is among the most controversial issues currently under debate by those concerned with the civil justice system." Gustave H. Shubert, [RAND-ICJ Director], Forward to Mark Peterson, Syam Sharma, and Michael Shanley, Punitive Damages: Empirical Findings, RAND Report, R-3311-ICJ (1987), at i. Similarly, the RAND-ICJ study noted that "as with many other civil justice issues, the debate [concerning punitive damages] has proceeded without much attention to facts." Id. Thus, "despite the attention they have received, there has been little

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[4] Posner and Landes took pains to

> note that the sample itself is likely to be unrepresentative of the universe of products liability cases -- but unrepresentative in a direction that tends to bias our estimate against the hypothesis we test, and reject: that punitive damages are being overused in modern products liability law.

William M. Landes and Richard A. Posner, The Economic Structure of Tort Law (1987), at 302 (emphasis added). Thus, they explained that

> [t]he economic theory of litigation predicts that cases most likely to be litigated and appealed will be those where the law is most uncertain and where damages largest. This suggests that our sample will overstate the relative importance of punitive damages in products liability cases; an award of punitive damages will increase the probability of an appeal. Of course, if parties are highly risk averse, this would tend to raise the settlement rate in cases where punitive damages are likely to be awarded if the case is tried. But we have offered reasons for doubting the importance of risk aversion in the products liability area.

Id., at 302-03 (footnote omitted; emphasis added).

empirical analysis of their number, their size, or the conditions under which they occur." Id., at v. Like Judge Posner and Professor Landes, the RAND-ICJ researchers set out to change that state of affairs, examining all civil jury trials in San Francisco County, California and Cook County (Chicago), Illinois from 1960 to 1984 and all civil jury trials in the state of California from 1980 to 1984. Id.

As Judge Posner and Professor Landes noted in their book, the results of the RAND-ICJ study were consistent with the results of their own research. Landes and Posner, supra, at 306. Thus, the RAND-ICJ:

> analyses show that the incidence of punitive damages has been quite small throughout the 25-year period in Cook County (on average, less than three such awards per year) and in San Francisco County (one per year). The pattern is similar in the rest of California from 1980 to 1984. Product liability cases have been of special concern to many critics, but our analyses indicate that punitive damages were awarded in only four product liability cases in San Francisco and two in Cook County from 1960 through 1984.

Peterson, Sharma, and Shanley, supra, at v (emphasis added). Or, as Judge Posner and Professor Landes summarized the RAND-ICJ data, during the twenty-five year period studied: "only eight-tenths of 1 percent of all jury trials in San Francisco in products liability cases resulted in . . . an award [of punitive damages]; the corresponding figure for Cook County was only one-tenth of 1 percent." Landes and Posner, at 306-07.[5]

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[5] Along the same lines, the RAND-ICJ analysts noted that

> [i]n the 1980's in Cook County the number of punitive damage awards for personal injury cases barely increased, but the amount of money awarded rose sharply. After having awarded only $1.6 million (in 1984 dollars) during the previous twenty years, Cook County juries awarded $27 million during the early 1980's. Most of the dollars were awarded in three cases with exceptionally large awards.

Id. at v-vi (footnote omitted; emphasis added). Similarly,

> [i]n San Francisco [County], the total amount of money awarded in punitive damages increased sharply in the late 1970's; between 1980 and 1984 the same amount was awarded as in the immediately preceding period, although the total number of personal injury trials dropped sharply.

Id., at vi.

As the RAND-ICJ summarized its research: "punitive damages were rarely awarded in personal injury litigation and when awarded were usually small. But the largest awards have increased in recent years." RAND-ICJ Study at vi (emphasis added).

3) GAO STUDY (1989) -- The U.S. Government Accounting Office ("GAO") analyzed the frequency and size of punitive damage awards by collecting and reviewing court records in all (305) products liability cases resolved through trial between 1983 and 1985 in five representative states -- Arizona, Massachusetts, Missouri, North Dakota and South Carolina. U.S. General Accounting Office, Product Liability: Verdicts and Case Resolutions in Five States, Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce, House of Representatives, GAO/HRD-89-99 (Sept. 1989) ("GAO Study"), at 2.

The GAO made the same basic findings and reached the same basic conclusions as did Judge Posner and Professor Landes and the RAND-ICJ researchers, viz.: that punitive damages were awarded infrequently (in only 23 of 305 cases -- 7.5%) and "were

highly correlated (.71) [in size] with the compensatory damages [awarded]." Id., at 3. For example:

> [t]he 23 punitive damage awards had an average just under $1.3 million and a median of $400,000, which are only slightly larger than the average and median compensatory awards in those 23 cases (average of $906,000 and median of $375,000.)

Id., at 29.

Furthermore, the GAO found that post-trial appeals and settlements substantially reduced the size of punitive damage awards. Thus, for example:

> Appellate courts reversed or remanded for trial all punitive damages awards on which they ruled. The courts ruled on 12 punitive damages awards: 9 were reversed and 3 were vacated and remanded for retrial. For only 1 of 9 awards that were reversed, the compensatory damages was also reversed.

Id., at 4 (emphasis added). See id., at 37.

4) AMERICAN BAR FOUNDATION ("ABF") STUDY (MINNESOTA LAW REVIEW ARTICLE) (1990) – Stephen Daniels and Joanne Martin, Senior Research Fellow and Associate Director, respectively, of the American Bar Foundation ("ABF") examined 25,627 jury verdicts handed down in state trial courts from 1981 to 1985, a period deliberately selected because of the assertedly large numbers of excessive punitive damages awarded during the early 1980's. Stephen Daniels and Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 28 (1990). Daniels and Martin drew data from state jury verdict reporters in 47 counties in eleven states. The sample was regionally balanced in areas of "varying population sizes and socio-economic make-ups." Id. at 29.

Like the researchers who published the three studies that preceded their own, Daniels and Martin found little empirical support for the notion that punitive damages were routinely awarded, that such damages were routinely awarded in large, let alone excessive, amounts, that the number of awards was rapidly increasing, that the size of awards were exponentially expanding, or that whatever problems may have existed on any score in any location was representative of a problem that was truly national in scope and did not represent a merely local anomaly.

Thus, for example, Daniels and Martin found that: punitive damages were awarded in only 34 (8.9%) of the 967 products liability cases evaluated. Id., at 38. See id., Table V. The ABF researchers identified a second major controversy in punitive damages as the "debate over the dollar value of punitive damage awards." Id. at 39. Daniels and Martin not only found that punitive damage awards were unusual, but also relatively small. The median punitive damages award in jurisdictions having 10 or more punitive awards ranged from under $10,000 in some counties to as high as $204,000 in San Diego. Id. at 42. They concluded that, contrary to the claims made by various so-called "tort-reformers":

> punitive damages were not routinely awarded. Nor were punitive damages typically given in amounts that "boggle the mind." Juries awarded punitive damages infrequently, and when they were awarded, the amount was generally modest. . . . The punitive damages system that emerges from this study is significantly different than the system described by the [tort] reformers, and does not provide evidence of a nationwide problem. Thus, one should view with skepticism the claims that juries routinely awarded punitive damages in large amounts, and that these developments were nationwide in scope.

Id., at 43 (emphasis added).

Finally, Daniels and Martin confirmed the results recorded by other researchers -- that punitive damages were not increasing rapidly in number or size, see id., at 43-57, nor were they "out of proportion", let alone "grossly" or "excessively" so. See id., at 57-62.

5) **RUSTAD-KOENIG STUDY (1991)** -- Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts (1991), by Suffolk University Law Professor Michael Rustad[6] and Northeastern University Professor of Sociology Thomas Koenig[7] is not just the most recent empirical study but also the most comprehensive.[8] Unlike the previously-discussed empirical studies, each of which sampled data from just a few cities, counties, or studies and/or for a relatively short (less than five years) period of time, the Rustad-Koenig Study collected and examined data from every conceivable source -- (a) published and non-published opinions, (b) law review articles and commentaries, (c) court records, (d) computer databases, (e) specialized, single-topic or single-topic trial verdict newsletters and reporters, (f) state and regional reporters, and (g) questionnaires sent to and (h) follow-up interviews with plaintiffs' and defense attorneys -- regarding every products liability case filed anywhere in the United States during the 25 year period from 1965 through 1990 that resulted in a punitive damages award. See Rustad-Koenig Study at 1-21. The findings included the following:

(A) Punitive damages were rarely awarded in products liability cases -- Of all the products liability cases nationwide over the twenty-five years from 1965 to 1990, punitive damages were awarded in only 355 cases; of those cases 95 (27%) involved asbestos. The researchers located seven awards from 1965 through 1970 (none for asbestos) and seventeen awards from 1971 through 1975 (again, none for asbestos). As reflected in the following chart, between 1976 and 1980, awards increased to forty-one (as the first two awards of punitive damages in asbestos cases were rendered -- 12% of the total) and increased again between 1981 and 1985 to 139 (including 20 awards in asbestos cases -- 39% of the total). Finally, between 1986 and 1990, the total number of awards increased to 151 cases (including 73 asbestos cases -- 43% of the total). Rustad-Koenig Study at 23-25.

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[6] Professor Rustad is Counsel of Record on this brief.

[7] Professor Koenig is one of the amici on this brief.

[8] See also Michael Rustad, In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes With Empirical Data, forthcoming in 77 Iowa L. Rev. 1 (1993); Michael Rustad and Thomas Koenig, The Historical and Contemporary Functions of Punitive Damages: Reforming the Tort Reformers, forthcoming in 42 Am. Univ. L. Rev. (1993); Thomas Koenig and Michael Rustad, The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability, forthcoming in 14 Just. System J. (1993); Providing for a Uniform Product Liability Law, Hearings on S. 640 Before the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 1st Sess. 6-7, Sept. 19, 1991 (Testimony of Professors Michael Rustad and Thomas Koenig); Product Liability, Hearing Before the Subcomm. on Technology and Competitiveness of the Comm. on Science, Space, and Technology, U.S. House of Representatives, 102d Cong., 2d Sess. 283-310, Aug. 4, 1992 (Testimony of Professors Thomas Koenig and Michael Rustad).

TABLE I

YEARS	ASBESTOS CASES Absolute and Percentage Increase + or Decline - from Previous Five Years	NON-ASBESTOS CASES Absolute and Percentage Increase + or Decline - from Previous Five Years	TOTAL CASES Absolute and Percentage Increase + or Decline - from Previous Five Years
1965-1970	0 N/A N/A	7 N/A N/A	7 N/A N/A
1971-1975	0 0 N/A	17 +10 +142%	17 +10 +142%
1976-1980	2 +2 N/A	39 +22 +129%	41 +24 +141%
1981-1985	20 +18 +900%	119 +80 +205%	139 +98 +239%
1986-1990	73 +53 +265%	78 *-41* *-65%*	151 +32 +8%
TOTALS	**95**	**260**	355

(B) **The Rate of Increase of Non-Asbestos Punitive Damages Awards Slowed from 1981 to 1985 and Declined from 1986 to 1990** -- Although these numbers reveal an absolute increase in the number of punitive damages awards during the years studied, they also demonstrate two highly significant countervailing trends: **first**, a relative slowdown in the rate of growth of both asbestos-related and non-asbestos punitive damages awards from the third five year period to the fourth (from 41 to 139 -- a rise of 239%) and from the fourth five-year period to the fifth (from 139 to 151 -- a rise of 8%); and **second, both an absolute and relative decline in number of non-asbestos cases from the penultimate five year period to the final five-year period (dropping from 119 to 78 -- a decrease of 65%).** Put differently, once asbestos-related cases are controlled for, the number of punitive damages awards in products liability cases declined from 1986 to 1990. Thus, despite the conjectures of some commentators, the fears of non-asbestos defendants, and, perhaps, the expectations of some plaintiffs' lawyers, the pattern developed in asbestos cases has not been followed in litigation involving other products; asbestos has been, and remains, a sui generis mass tort. Rustad-Koenig Study at 23-25.

(C) **Punitive Damages Awards Are Frequently Reversed or Reduced After Trial** -- The figures incorporated in the preceding table represent the number of awards rendered at trial, not the number of awards upheld (in whole or in part) on appeal, nor the number of awards eventually collected (in whole or in part), either after trial or after appeals. Post-trial

case dispositions, as reflected in the following table, reveal that less than one-quarter (78 awards or 22%) of all punitive damages awarded were completely upheld on appeal, while a greater portion of all awards (90 awards or 25%) were either completely reversed or wholly or partially remitted). Rustad-Koenig Study at 27.

Media accounts of punitive damages awards tend to report the amounts awarded at trial, but rarely report post-trial reductions. Unfortunately, much of the debate concerning the "skyrocketing size" of punitive damages awards has likewise focused on the amounts awarded by juries and not the sums remitted by trial judges, let alone the dispositions rendered by appellate court.

The Rustad-Koenig Study revealed, however, contrary to popular assumption, that in three out of every four verdicts decided in the late 1960's, appellate courts reversed or adjusted downward the punitive damages awarded at trial. Since those first cases, slightly over half of the punitive awards at trial have been reversed or adjusted downward by appellate courts. In the 1970's, appellate courts affirmed 47% of the decisions they reviewed (14 of 30 trial verdicts). In the 1980's, appellate courts affirmed 46 percent of trial verdicts. The largest punitive damages awards are most likely to be reduced or eliminated post-trial. Indeed, only 11.2% of all punitive damages awards of $10 million or more were collected.

The systematic Rustad-Koenig Study of post-trial modifications of punitive damages awards paints a picture similar to that of the GAO study and one very dissimilar to the partial anecdotes printed by the media and others. The following table summarizes

the disposition of the cases that were analyzed by the Rustad-Koenig researchers.

TABLE II

CASE DISPOSITION	No.	%
Award completely affirmed on appeal	78	22%
Award wholly reversed or partly remitted	90	25%
Case settled and award collected while appeal was pending	128	36%
Case (and collection of award) stayed in bankruptcy	37	10%
Appeal still pending	22	6%
TOTAL	355	99%

As reflected in the preceding table, of the cases that were appealed, almost half (48%) were affirmed in their entirety. On the other hand, in slightly over half of these cases (52%), the awards were reduced. Although compensatory damages were affirmed in 73% of these cases, punitive damages were affirmed in only 55%, suggesting greater appellate scrutiny for awards of punitive damages. Rustad-Koenig Study at 30-32. In sum, slightly more than half of the verdicts were reversed or reduced on appeal and punitive damages were completely erased in 40% of those cases. Rustad-Koenig Study at 27, 31.

(D) <u>Awards of Compensatory Damages Are Upheld More Regularly Than Are Awards of Punitive Damages</u> -- In 14% of the appellate decisions (22 cases), the plaintiff received no compensatory damages. The median compensatory award allowed by appellate courts was $212,783 or 42% of the original compensatory portion of the

verdict. Punitive damages fared far worse, with 37% of the plaintiffs receiving nothing. The median punitive award, when any money was received, was $135,000, or 23% of the original punitive damages awarded at trial. Rustad-Koenig Study at 32.

(E) **Punitive Damages Awards Are Not "Skyrocketing" in Size and Are More Than Double the Size of Compensatory Damages Awards in Less Than Half the Cases** -- As stated earlier, punitive damages awards occur much less frequently than is generally believed. Also contrary to popular belief, the size of punitive damages awards is much smaller than is generally believed. Although almost all of the popular attention focuses upon the million - dollar verdicts, juries awarded such verdicts in only 36% of the cases.

To be sure, awards of punitive damages exceeded awards of compensatory damages in 208 (59%) of the cases reported in the Rustad-Koenig Study. Moreover, in 38% of the cases reported, punitive damages more than doubled the amount of compensatory damages. On the other hand, compensatory damages exceeded punitive damages in 35% of the cases and more than doubled the size of the punitive awards in 23%. Rustad-Koenig Study at 28-29.

The median compensatory damage award for the 355 cases found was $500,100. The median punitive damages award for the 355 cases was $625,000, i.e., only 25% higher than the median compensatory award. Both figures are fully consistent with those depicted in the RAND-ICJ Study. Rustad-Koenig at 29. When adjusted for inflation, this punitive damages award median is quite similar to the RAND-ICJ figures. That study found that a number of extremely large awards raised the average and accounted for a majority of total amounts awarded. The RAND-ICJ

median for the total award, including both compensatory and punitive damages, is $1,457,600. One-fourth of these total awards were $500,000 or less. When inflation was controlled for (through the use of constant 1983 dollars), the median punitive damages award was $688,500, as compared with $516,000 in compensatory damages. Rustad-Koenig Study at 28-29.

SUMMARY OF THE FINDINGS AND CONCLUSIONS OF THE FIVE EMPIRICAL STUDIES

The five reports discussed above are remarkable for four things:

a) the diversity of their authorship and sponsorship -- being published, respectively, by two leading lights of the "Law and Economics" school of legal scholarship, a private research foundation supported by "pooled grants from corporations, private foundations, trade and professional associations and individuals," RAND-ICJ at i, the U.S. Government, a think tank affiliated with the American Bar Association, and a series of major law review articles;

b) their common methodical approach to gathering and analyzing empirical data;

c) the consistency of their findings and conclusions; and

d) their common findings refute many of the anecdotal myths that fuel the controversy about punitive damages.

III. THE TEXACO STUDY PROVIDES TOO LITTLE ANALYSIS TO SUPPORT THE AMICI'S ARGUMENT THAT PUNITIVE DAMAGES ARE IN DIRE NEED OF SUBSTANTIVE OR PROCEDURAL REFORM

How, then, does the Texaco Study[9], which is relied on by a number of Petitioner's amici, fare in comparison? Unlike the other studies, the Texaco Study found that "[a]fter correcting for inflation, the amount of punitive damages increased 89 times over" during the twenty year period from 1968-71 to 1988-91, a "growth rate of punitive damages [that] has dwarfed the growth in the productive sectors of the economy." Texaco Study at v. This finding is open to some questions, which, because of the inadequacies of Texaco's presentation of data, are difficult to answer. For example:

a) Texaco's in-house lawyers and outside counsel, who authored the Texaco Study, analyze only appellate decisions, in clear violation of Judge Posner's and Professor Landes' admonition that such a choice biases the results in favor of finding huge awards. Landes and Posner, The Economic Structure of Tort Law (1987), at 302-03;

b) Texaco's lawyers report only awards that were affirmed on appeal; they do not report cases where judicial controls were successfully applied. Such post-trial reductions and reversals are a critical part of the procedural

[9] Stephen M. Turner, Lawrence R. Jerz, & Robert E. Fuller, George S. Branch, and James D. Miller, Punitive Damages Explosion: Fact or Fiction?, Washington Legal Foundation, (Nov. 1992)

reforms mandated by Haslip and, therefore, are an essential part of understanding the judicial checks on awards of punitive damages. By ignoring the punitive damages awards that were reversed or remitted by trial and appellate courts, Texaco's lawyers present a distorted view of the punitive damages picture.

c) Texaco's lawyers, unlike the researchers responsible for the studies discussed above, did not cross-classify the number and size of punitive damages awards by substantive fields, e.g., products liability, insurance bad faith actions, or employment discrimination. The failure of Texaco's lawyers to cross-classify, by substantive area and product type, the data they collected, also makes it difficult for a reader to determine the fields in which punitive damage awards are growing or whether the increase reported is due to the expansion of the remedy to such new fields as employment discrimination or insurance bad faith, as opposed to more traditional spheres like intentional torts. For example, it is impossible for the Court to know how many of the punitive awards from Texas, New York and California are attributable to asbestos litigation, which is generally regarded as unique.

Without disaggregation of these awards, it is unclear whether there is any cause for concern because, in these five large commercial states, which together contain 36 percent of the U.S. population, the authors found only 433 punitive damages awards against business which were upheld upon appeal during the period of 1988-1991. Texaco Study at 2. Although this figure is 4.7 times the number of cases Texaco's lawyers located in the 1968-1971 period, the unaggregated awards still averaged only 108 cases per year; and

d) Texaco's lawyers report only "mean" awards, rather than both the "median" and "mean" awards

employed by other researchers. As the ABF's researchers explained:

> A seemingly esoteric, technical debate underlines the issue of punitive damage award size as well as the issue of jury award sizes generally. It involves the appropriate measure of central tendency to use in describing patterns and changes in the typical award: the arithmetic mean (average) or the median. One obtains the mean, or average, punitive damage award by adding the amount of the awards together and dividing by the total number of awards. The mean's disadvantage is that a few unusually high or low figures in the data can skew the result upward or downward. The median punitive damage award, on the other hand is the middle figure in a sequence of awards listed from highest to lowest. A handful of high or low numbers in the data will not influence the median. The chosen measure is both politically and practically significant because the two measures can give significantly different values to the typical award.
>
> The [tort] reformers advocate the use and appropriateness of the mean to describe patterns and changes in award size. Their position is politically expedient because mean punitive damage awards, as well as mean jury awards generally, are misleadingly high.[10]

Daniels and Martin, Myth and Reality in Punitive Damages, at 39 (footnotes omitted; emphasis added). "[A]s a technical matter, the median is more appropriate" in comparing punitive damage awards. Id. at 40 (citing "a widely used textbook on statistics for the social sciences", Hubert Blalock, Social Statistics 55 (rev. 2d ed. 1979)).

In sum, we look forward to a more detailed report from Texaco. Until Texaco's attorneys present their data and analytical techniques in the methodologically rigorous fashion employed by the other researchers, we must reserve judgment on the accuracy of Texaco's findings and the validity of its conclusions.

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[10] For example, a single enormous award like the $3 billion in punitive damages assessed against Texaco for tortiously inducing Getty to breach its contract with Pennzoil (Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, (2d Cir. 1986), rev'd, 481 U.S. 1 (1987)), can tremendously skew a mean-based study. Thus, if there were 99 awards for $1 each and one award for $3 billion, the mean (average) award would be over $30 million, but that statistic would be highly misleading to anyone trying to assess the pattern of awards.

CONCLUSION

For the reasons set forth above, amici respectfully request that this Honorable Court leave undisturbed the decision of the Supreme Court of West Virginia.

Respectfully submitted,

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